Nos. 14-1167 and 14-1217

In the Supreme Court of the United States

ANADARKO PETROLEUM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

BP EXPLORATION & PRODUCTION INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the interlocutory decision below correctly held that petitioners—the owners of an offshore well that released massive amounts of oil into the Gulf of Mexico—are liable under 33 U.S.C. 1321(b)(7), which imposes civil penalties on the owner of any facility "from which oil * * * is discharged."

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-13a, 14a-28a)[1] are reported at 753 F.3d 570 and 772 F.3d 350. The opinion of the district court (Pet. App. 29a-63a) is reported at 844 F. Supp. 2d 746.

[1] Citations to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 14-1167.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2014. Petitions for rehearing were denied on January 9, 2015 (Pet. App. 64a-65a). The petitions for writs of certiorari were filed on March 24, 2015, and April 9, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises from the largest oil spill in United States history: the April 2010 blowout of the Macondo Well off the coast of Louisiana and the resulting release of millions of barrels of oil into the Gulf of Mexico.

a. Deepwater offshore wells extract oil from reservoirs thousands of feet below the seabed. Oil trapped at that depth is under tremendous pressure from the weight of the rocks and water above, and it will rush to the surface with great force if a path is made available. Deepwater offshore drilling thus creates a constant danger that the pressure on the reservoir will propel oil into the well, up the wellbore, and out into the environment. Such an uncontrolled release of oil is known as a "blowout." Gov't C.A. Br. 8-9.

b. Petitioners BP Exploration & Production Inc. (BP) and Anadarko Petroleum Corp. (Anadarko) were co-owners of the Macondo Well, an exploratory deepwater well located 50 miles off the Louisiana coast in the Gulf of Mexico. Pet. App. 1a-2a. The well was drilled in 5000 feet of water and reached from the seabed floor to an oil and gas reservoir 13,000 feet below. Gov't C.A. Br. 8.

The Macondo Well was drilled by a mobile offshore drilling unit—commonly known as a "rig"—called the *Deepwater Horizon*. Pet. App. 2a. The *Deepwater*

Horizon was owned by a group of entities known as Transocean, which had been hired by BP to drill the well under BP's direction. *Id.* at 2a & n.2; Gov't C.A. Br. 11. The *Deepwater Horizon* was connected to the well by a "riser" and a "blowout preventer." Pet. App. 2a. The riser was a 5000-foot pipe extending down from the rig, and the blowout preventer was a 50-foot-tall device connecting the riser to the well on the seabed floor. *Ibid.*; Gov't C.A. Br. 24; see 21 F. Supp. 3d at 666 (illustration). The blowout preventer functioned both as a drilling tool and as an emergency safety mechanism. *Inter alia*, it was designed to seal the well and halt the upward flow of oil into the riser if control of the well was lost. Pet. App. 2a; Gov't C.A. Br. 9. Both the riser and the blowout preventer were appurtenances of the *Deepwater Horizon*. Pet. App. 2a-3a.

c. On April 20, 2010, the Macondo Well blew out and began a massive, uncontrolled discharge of oil into the Gulf of Mexico. Pet. App. 3a. The blowout occurred as the *Deepwater Horizon* was preparing to abandon the well temporarily so that a different rig could be brought in to complete the development of the well for oil production. *Ibid.*; Gov't C.A. Br. 12. In part because the abandonment procedure included the removal of the blowout preventer and riser, the well itself had to contain barriers sufficient to prevent oil from escaping. Pet. App. 3a, 18a-19a; Gov't C.A. Br. 12.

As part of the abandonment process, cement was pumped into the bottom of the wellbore to prevent oil from moving from the reservoir into the well. Pet. App. 3a. The cement failed to seal the well, however, "resulting in the high-pressure release of gas, oil, and

other fluids" while the *Deepwater Horizon* was still in place. *Ibid.*; see *id.* at 18a-19a. The blowout preventer also failed, allowing the oil and gas surging up from the well to continue through the riser and onto the deck of the *Deepwater Horizon*. *Id.* at 3a. The escaping oil and gas exploded, killing 11 workers and setting the rig on fire. *Ibid.*; Gov't C.A. Br. 11.

After burning for two days, the *Deepwater Horizon* sank. Pet. App. 3a; Gov't C.A. Br. 13. The riser was severed far below the water's surface, and for the next three months oil gushed from the well into the Gulf. *Ibid.* Initially, the oil flowed through the blowout preventer and out the severed riser. *Ibid.* Later, the remnants of the riser were cut away, and oil flowed out the top of the blowout preventer. Gov't C.A. Br. 13. The flow of oil was finally halted in July 2010, after a cap was installed on the blowout preventer. *Ibid.*; Pet. App. 3a.

2. The Macondo Well blowout caused enormous damage and has spawned numerous civil and criminal proceedings. This case is a suit brought by the United States to recover civil penalties under Section 311 of the Clean Water Act (CWA), 33 U.S.C. 1321, a provision originally enacted in response to a major spill caused by the 1969 blowout of an offshore well near Santa Barbara, California.[2]

As relevant here, Section 1321(b)(3) prohibits "[t]he discharge of oil or hazardous substances" into "the navigable waters of the United States" or "in connection with activities under the Outer Conti-

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[2] See Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91; see also H.R. Conf. Rep. No. 940, 91st Cong., 2d Sess. 37 (1970); S. Rep. No. 351, 91st Cong., 1st Sess. 6 (1969); H.R. Rep. No. 127, 91st Cong., 1st Sess. 2 (1969).

nental Shelf Lands Act" (OCSLA), 43 U.S.C. 1331 *et seq.*[3] Section 1321(b)(7), in turn, imposes civil penalties on "[a]ny person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3)." 33 U.S.C. 1321(b)(7)(A). For purposes of Section 1321, the term "'discharge' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping," other than certain discharges authorized by permit. 33 U.S.C. 1321(a)(2).

Section 1321(b)(7) is a strict-liability provision, imposing penalties "irrespective of knowledge, intent, or fault." Pet. App. 11a. A defendant's culpability is considered, however, in determining the maximum penalty available and the appropriate penalty in a particular case. When a discharge results from a defendant's gross negligence or willful misconduct, the maximum penalty increases from $1100 to $4300 per barrel of oil discharged. 33 U.S.C. 1321(b)(7)(A) and (D); see 40 C.F.R. 19.4 (inflation adjustments). Subject to the applicable maximum, a court sets the penalty in a particular case by considering eight factors, including "the seriousness of the violation," "the degree of culpability involved," and "any other matters as justice may require." 33 U.S.C. 1321(b)(8); see, *e.g.*, *United States* v. *CITGO Petroleum Corp.*, 723 F.3d 547, 551-554 (5th Cir. 2013).

3. In December 2010, the government filed this action seeking Section 1321(b)(7) penalties against peti-

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[3] Activities under OCSLA include the drilling, operation, and abandonment of oil wells on the outer continental shelf, a zone that encompasses the site of the Macondo Well. 43 U.S.C. 1331, 1333(a), 1334; see Gov't C.A. Br. 25.

tioners and others, including Transocean. Gov't C.A. Br. 2-3. The district court granted in part and denied in part the government's motion for partial summary judgment. Pet. App. 29a-63a.[4]

a. The district court held that petitioners were liable under Section 1321(b)(7) because the Macondo Well was the facility "from which oil * * * [wa]s discharged in violation of [Section 1321(b)(3)]." Pet. App. 50a; see *id.* at 50a-63a. Petitioners conceded that the well was an "offshore facility" and that they were its owners. *Id.* at 61a. They also did not dispute that the oil that spilled into the Gulf of Mexico had been "discharged in violation of [Section 1321(b)(3)]." They asserted, however, that because oil flowing from the well had passed through the blowout preventer and riser before entering the Gulf, it had been "discharged" only "from" the riser—which was part of the *Deepwater Horizon* and owned by Transocean—and not "from" the well. *Id.* at 53a.

The district court rejected that argument. Pet. App. 53a-61a. The court stated that the word "from" ordinarily refers to "'a starting point' or 'source or original or moving force of something.'" *Id.* at 55a. It then held that, for purposes of Section 1321(b)(7), a discharge is "from" the facility or vessel "where the uncontrolled movement of oil began." *Ibid.* The court concluded that, in this case, the "uncontrolled movement of oil began in the well." *Id.* at 56a. The court

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[4] The district court also granted the government's separate request for a declaratory judgment that petitioners are liable for cleanup costs and damages under the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.* Pet. App. 45a-46a, 48a-49a. That aspect of the case is not at issue here. *Id.* at 4a.

therefore held that petitioners were liable for the discharge as the well's owners. *Id.* at 61a, 63a.

b. The government argued that oil had been discharged from *both* the Macondo Well *and* the *Deepwater Horizon*, and that Transocean therefore was liable as the owner of the rig. Pet. App. 52a-53a. The district court rejected that argument, holding that oil had been discharged only from the well. *Id.* at 61a-62a. The court concluded, however, that "a question remain[ed]" as to whether Transocean was liable under Section 1321(b)(7) as the well's operator, and that this question involved factual disputes that could not be resolved on summary judgment. *Id.* at 62a-63a.

c. After the district court issued its order, Transocean and the government agreed to a consent decree that resolved the government's Section 1321(b)(7) claim and required Transocean to pay $1 billion in civil penalties. Gov't C.A. Br. 16-17.

4. Petitioners filed interlocutory appeals, and the court of appeals affirmed. Pet. App. 1a-28a.

a. The court of appeals explained that, under Section 1321 the word "discharge" "includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping." Pet. App. 7a (quoting 33 U.S.C. 1321(a)(2)). The court observed that each of those examples "denotes the loss of controlled confinement," and that the ordinary meaning of the word "discharge" likewise "refers to a fluid 'flow[ing] out from where it has been confined.'" *Ibid.* (brackets in original). The court therefore concluded that "a vessel or facility is a point 'from which oil * * * is discharged' if it is a point at which controlled confinement is lost." *Ibid.* The court further held that in this case, "controlled confinement was lost" in the Macon-

do Well when the cement pumped into the well failed to seal it and "oil then 'escaped' and 'flowed freely' from the well and ultimately into" the Gulf. *Id.* at 7a-8a.

The court of appeals rejected petitioners' argument that oil had been discharged only "from" the *Deepwater Horizon* because the oil had passed through the rig's blowout preventer and riser before entering the water. Pet. App. 8a-13a. The court explained that petitioners had "provide[d] no relevant legal authority" supporting their contention that the only point from which oil is discharged is "the point at which oil 'enters the marine environment.'" *Id.* at 8a. In contrast, numerous decisions had imposed liability under Section 1321 even though the discharged oil had traveled over or through other property, including property owned by third parties, before reaching water. *Id.* at 8a-10a & n.9. The court explained that it was "aware of no case in which a court or administrative agency exempted a defendant from liability on account of the path traversed by discharged oil." *Id.* at 10a.

b. Petitioners sought rehearing en banc, and the court of appeals issued a supplemental opinion responding to their arguments. Pet. App. 14a-28a.

The court of appeals rejected petitioners' assertion that its original opinion had rested on the mistaken assumption that the cement pumped into the well had temporarily sealed the well before failing. Pet. App. 16a-21a. The court explained that its opinion "was not intended to imply that the cement created a *successful* seal in the well." *Id.* at 16a. The court added that the issue was a "red herring" because the only point relevant to its holding was "the fact that the cement in the well ultimately failed to stop the flow of oil (regardless

of whether the cement at any prior point functioned as expected), and that control was therefore lost in the well." *Id.* at 16a-17a.

The court of appeals also rejected petitioners' characterization of its initial decision as holding that a given discharge of oil can be "from" only a single vessel or facility. Pet. App. 21a-23a. The court explained that, "[b]ecause the Transocean entities settled, [the court] did not need to consider whether the oil discharged from the well might also have constituted a 'discharge' from the *Deepwater Horizon*." *Id.* at 21a. The court added that it "explicitly did not reach" the question whether "only one instrumentality may be held liable for a given discharge." *Id.* at 23a.

Finally, the court of appeals rejected petitioners' other challenges to its reasoning, including their contention that the court should have construed Section 1321(b)(7) narrowly based on the rule of lenity or on an analogous canon for statutes that impose civil penalties. Pet. App. 27a. The court explained that those canons did not apply in this case because the relevant interpretive considerations "clearly demonstrate that a vessel or facility is a point 'from which oil or a hazardous substance is discharged' if it is a point at which controlled confinement is lost." *Ibid.* (citation omitted).

c. The court of appeals subsequently denied rehearing en banc. Pet. App. 64a-65a. Judge Clement, joined by five of her colleagues, dissented. *Id.* at 65a-67a. She argued that the "loss of controlled confinement" test was inconsistent with the statute. *Id.* at 65a-66a. She also asserted that the panel's supplemental opinion had changed its holding by replacing the prior "loss of controlled confinement" test with an

"absence of controlled confinement" standard. *Id.* at 66a-67a. In her view, that change reflected the panel's "attempt[] to overcome the fact that there was never confinement in the well." *Ibid.*

5. While petitioners' interlocutory appeal was pending, the district court conducted a three-phase trial to determine the amount of civil penalties to assess against petitioners.

Phase One addressed attribution of fault for the blowout. In September 2014, the district court found that the discharge had resulted from BP's gross negligence and willful misconduct, and that BP was therefore subject to an enhanced per-barrel penalty under Section 1321(b)(7)(D). 21 F. Supp. 3d at 742-743.[5] BP filed an interlocutory appeal from the court's Phase One decision, and its opening brief is currently due on June 1, 2015. 14-31374 Docket entry (May 4, 2015).

Phase Two addressed the efforts made to stop the flow of oil into the Gulf and the amount of oil discharged. In January 2015, the district court issued findings in which the court concluded, *inter alia*, that petitioners' maximum civil penalty under Section 1321(b)(7) should be calculated based on the discharge of 3.19 million barrels of oil. 2015 WL 225421, at *22.

Phase Three will determine petitioners' civil penalties based on the statutory factors set forth in 33 U.S.C. 1321(b)(8). A two-week bench trial concluded on February 2, 2015. The district court has not yet issued an order fixing the amount of penalties.

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[5] The United States did not seek an enhanced penalty as to Anadarko. See 21 F. Supp. 3d at 731.

ARGUMENT

Petitioners urge this Court to grant review of the interlocutory decision below and hold that oil was not discharged "from" the Macondo Well because it passed through the blowout preventer and riser before entering the Gulf of Mexico. BP Pet. 14-37; Anadarko Pet. 10-24. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Indeed, petitioners do not cite any judicial decision that has endorsed their interpretation of Section 1321(b)(7). Further review is not warranted.

1. The interlocutory posture of this case would "alone furnish[] sufficient ground for the denial" of the petitions even if the question presented otherwise warranted review. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). The reasons for that well-established practice apply with full force here. At a minimum, deferring any review until final judgment would allow this Court to consider all of petitioners' claims together—including those claims relating to the amount of the penalties, some of which are already pending in the court of appeals.

In addition, the ongoing proceedings may substantially diminish the significance of the question presented. In its Phase One order, the district court found that BP was not merely the owner of the Macondo Well, but also "an 'operator' and a 'person in charge' of the [*Deepwater Horizon*]" because BP had

directed the rig's operations. 21 F. Supp. 3d at 746. Unless that finding is eventually reversed on appeal, BP "is liable under [Section 1321(b)(7)] even if it is later determined that the discharge was 'from' the [*Deepwater Horizon*] and not ['from' the well]." *Ibid.*; see 33 U.S.C. 1321(b)(7) (imposing penalties on "[a]ny person who is the owner, operator, or person in charge" of a vessel or facility from which oil is discharged). It is therefore unclear, at the current interlocutory stage of the case, whether this Court's resolution of the question presented here would have any practical effect on BP's liability.

2. The court of appeals correctly held that petitioners are liable for civil penalties because the Macondo Well was a facility "from which oil * * * [wa]s discharged," 33 U.S.C. 1321(b)(7), and petitioners are the owners of that facility.

a. Section 1321(a)(2) provides that, for purposes of Section 1321, the term "discharge" "includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping" of oil. That definition was intended "to cover by its broad terms all possible means of fouling the waters with oil." H.R. Conf. Rep. No. 940, 91st Cong., 2d Sess. 33 (1970). It readily encompasses the release of millions of barrels of oil into the Gulf of Mexico.

The oil released into the Gulf was discharged "from" the Macondo Well. In ordinary usage, the word "from" denotes "a point or place where an actual physical movement * * * has its beginning," *Webster's Third New International Dictionary of the English Language* 913 (1993), or "a point of departure or place whence motion takes place," *Oxford English Dictionary*, http://www.oed.com/view/Entry/74884

(last visited May 21, 2015). Oil was thus discharged "from" the well because it began its continuous, uncontrolled release into the Gulf from a point inside the well when the cement pumped into the wellbore failed to seal off the well from the reservoir below. Pet. App. 18a-19a.

The court of appeals noted that Section 1321(a)(2) defines the term "discharge" using words that typically denote "the loss of controlled confinement." Pet. App. 7a. The court therefore reasoned that oil was discharged "from" the Macondo Well because the well was "a point at which controlled confinement [wa]s lost." *Ibid.* The court's interpretation of "discharge" was correct.[6] But the result would be the same whether the discharge at issue here is regarded as a "loss of controlled confinement," a "spill[]," an "emi[ssion]," or—to use Anadarko's preferred formulations (Pet. 10-11)—a "flowing" or an "issuing out." The oil moved in a continuous, uninterrupted surge out of the well, through the blowout preventer and riser, and into the Gulf. As a matter of ordinary usage, the oil therefore spilled, flowed, issued, and was emitted "from" the well.[7]

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[6] As the court of appeals observed, its understanding accords with the relevant ordinary meaning of "discharge," which is "[t]o cause or allow (a liquid, gas, or other substance) to flow or pass out from a place where it has been contained." *Oxford English Dictionary*, http://www.oed.com/view/Entry/53708 (last visited May 21, 2015); see Pet. App. 7a & n.7. Petitioners therefore are wrong in asserting (BP Pet. 34; Anadarko Pet. 16) that the court of appeals' reading of the statute was somehow unmoored from the statutory text.

[7] BP's own pleadings reflect the same understanding. In a criminal plea agreement, BP admitted that it had "negligently discharged and caused to be discharged oil *from* the Macondo well."

b. Petitioners contend that, for purposes of Section 1321(b)(7), oil is discharged only "from" the "vessel or facility from which oil *directly* entered the environment." Anadarko Pet. 14 (emphasis added); see BP Pet. 8, 33, 35. They assert that the oil at issue here was discharged only "from" the *Deepwater Horizon* because the oil passed briefly through the rig's blowout preventer and riser before entering the Gulf. That interpretation is untenable.

The most obvious flaw in petitioners' interpretation is that it would require the Court to "read[] words * * * into [the] statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997). Section 1321(b)(7) imposes civil-penalty liability on the owner of "any vessel, onshore facility, or offshore facility from which oil * * * is discharged"—not just those vessels or facilities from which oil is discharged *directly* into the water. In the absence of such limiting language, there is no sound reason to construe the phrase "from which oil * * * is discharged" as restricting liability to the vessel or facility that last touched the oil before it entered the water. Cf. *Rapanos* v. *United States*, 547 U.S. 715, 743 (2006) (opinion of Scalia, J.) (explaining that, in interpreting CWA provisions governing the "discharge" of pollutants, courts have held that a discharge violates the statute "even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances'").

2:12-cr-292 Docket entry No. 2-1, at 16 (Nov. 15, 2012) (emphasis added). Similarly, BP's answer in this case admitted that oil "flowed into the Gulf of Mexico *from* the Macondo well for 87 days." 2:10-md-2719 Docket entry No. 1858, at 1-2 (Apr. 4, 2011).

Petitioners' reading would also produce anomalous results by allowing a discharger of oil to avoid Section 1321(b)(7) penalties so long as the oil passed over or through a vessel or facility owned by another person before reaching the water. Under petitioners' view, for example, Section 1321(b)(7) would not apply to a facility that spilled oil into the water by way of a "third-party culvert," a "storm sewer," "municipal sewers or ditches," or a "rail yard." Pet. App. 8a-9a & n.9 (citing CWA cases involving those facts).[8] Indeed, petitioners' view would apparently allow the owner of an industrial facility to escape Section 1321(b)(7) liability simply by dumping oil across the deck of an unsuspecting vessel rather than directly into the water. In this case, petitioners' reading would mean that, when a "capping stack" was placed over the blowout preventer in July 2010, "the capping stack became the new point of discharge, since oil thereafter spewed out the capping stack for three days until it could be fully closed." *Id.* at 56a.

Finally, petitioners' reading would substantially impede the achievement of Section 1321(b)(7)'s purposes. As Anadarko recognizes (Pet. 21), the statute seeks to "subject[] to penalties the 'owners, operators,

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[8] Section 1321 does not limit the terms "vessels" and "facilities" to entities engaged in the oil industry. Rather, it broadly defines the term "onshore facility" to mean "any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land." 33 U.S.C. 1321(a)(10). As the court of appeals observed, that definition is broad enough to encompass sewers and any number of other structures through or over which spilled oil might flow before reaching the water. Pet. App. 22a & n.6; see 33 U.S.C. 1321(a)(3) and (11) (comparably broad definitions of "vessel" and "offshore facility").

and persons in charge' who are in the best position to prevent [a] discharge from happening in the first place." See H.R. Conf. Rep. No. 653, 101st Cong., 2d. Sess. 154 (1990) ("Civil penalties should serve primarily as an additional incentive to minimize and eliminate human error and thereby reduce the number and seriousness of oil spills."). That purpose is ill-served by a rule that limits liability exclusively to the owners and operators of the last vessel or facility that oil touches on its way to the water. Here, for example, the spill began when the cement pumped into the Macondo Well failed, and the "owners, operators, and persons in charge" who were best-positioned to prevent the disaster therefore included the "owners, operators, and persons in charge" of the well.

3. The decision below does not conflict with any decision of this Court or another court of appeals. To the contrary, "no prior reported cases have presented facts that are directly analogous to those in the present case," Pet. App. 22a-23a; see *id.* at 8a, 10a, and petitioners cite no judicial decision that has adopted their interpretation of Section 1321(b)(7).[9]

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[9] Anadarko notes (Pet. 14-15 & n.2) that some decisions applying Section 1321 or analogous provisions have imposed penalties for discharges on the "vessel or facility from which oil directly entered the environment." But all of the cases it cites involved vessels that overflowed or leaked as they were taking on oil or gas; none involved anything like the continuous, uncontrolled flow of oil at issue here. See *United States* v. *Tex-Tow, Inc.*, 589 F.2d 1310, 1312 (7th Cir. 1978); *The Colombo*, 42 F.2d 211, 212 (2d Cir. 1930); *United States* v. *Chotin Transp., Inc.*, 649 F. Supp. 356, 358 (S.D. Ohio 1986); *United States* v. *The Catherine*, 116 F. Supp. 668, 669 (D. Md. 1953); *Liberian Poplar Transps., Inc.* v. *United States*, 26 Cl. Ct. 223, 224 (Cl. Ct. 1992). None of those decisions, moreover,

Anadarko notes (Pet. 10-12) that courts interpreting other CWA provisions have construed the term "discharge" to mean "a flowing or issuing out from a defined or contained space." Pet. 10 (quoting *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S 370, 376 (2006)) (internal quotation marks omitted). Anadarko asserts (Pet. 12) that those decisions are inconsistent with the court of appeals' conclusion that "a vessel or facility is a point 'from which oil * * * is discharged' if it is a point at which controlled confinement is lost." Pet. App. 7a. But none of the decisions on which Anadarko relies involved Section 1321, which contains its own definition of "discharge." 33 U.S.C. 1321(a)(2).[10] More importantly, none of those decisions addressed the question presented here: how to identify the source "from which" a substance had been discharged.

In any event, there is no inconsistency between decisions holding that a discharge is a "flowing or issuing out from a defined or contained space" and the court of appeals' view that a discharge involves a "loss of controlled confinement." To the contrary, the court endorsed and relied on a materially identical definition, explaining that "the ordinary use of 'discharge' refers to a fluid 'flow[ing] out from where it has been

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endorsed petitioners' view that a discharge is *always* "from" the vessel or facility that the oil last touches before it enters the water.

[10] See *S.D. Warren Co.*, 547 U.S at 375-376; *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 725 (1994) (Thomas, J., dissenting); *AES Sparrows Point LNG* v. *Wilson*, 589 F.3d 721, 731 (4th Cir. 2009); *Oregon Natural Desert Ass'n* v. *United States Forest Serv.*, 550 F.3d 778, 783 (9th Cir. 2008).

confined.'" Pet. App. 7a (citation omitted; brackets in original).[11]

4. Petitioners assert that several other features of this case warrant certiorari. Those arguments lack merit, and they provide no reason for this Court to depart from its usual practice of deferring any review until after final judgment in the courts below.

a. Petitioners repeatedly highlight the size of the maximum penalties established by Section 1321(b)(7)'s per-barrel formula. See, *e.g.*, BP Pet. 1-2, 14-17; Anadarko Pet. 3, 21. But those *potential* penalties do not justify immediate review when the lower courts have not yet determined the *actual* penalty amounts. Many of the same considerations that petitioners emphasize here—including their "degree of culpability" and "other penalt[ies] for the same incident"—are factors that the district court must take into account in determining the appropriate penalty. 33 U.S.C. 1321(b)(8). Relying on those factors, Anadarko has urged the district court to impose a "[z]ero-[d]ollar" or "nominal" penalty. 2:10-md-2179 Docket entry No. (Docket No.) 14343, at 3-4 (Mar. 27, 2015). BP has advocated a "limited CWA penalty" at "the low end of the statutory range." Docket No. 14344, at 1, 3 (Mar. 27, 2015).

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[11] Anadarko appears to assume (Pet. 12) that the phrase "loss of controlled confinement" excludes intentional discharges "such as 'pumping,' 'pouring,' 'emptying,' or 'dumping.'" As the court of appeals explained, that argument "confuses the terms 'control' and 'intent.'" Pet. App. 26a. The phrase "loss of controlled confinement" is naturally understood to encompass a circumstance in which a party "intentionally gives up control of oil that had been confined within a facility or vessel" by pumping, pouring, emptying, or dumping it. *Ibid.*

b. BP contends (Pet. 20-32) that the court of appeals erred by failing to apply the rule of lenity and the principle that civil-penalty provisions should be construed narrowly. BP urges this Court to grant review "to address doctrinal confusion" regarding those canons. Pet. 20; see Anadarko Pet. 19-21. Those arguments are unsound.

First, the court of appeals correctly declined to apply the rule of lenity or the civil-penalty canon. The court explained that those canons apply only "if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." Pet. App. 27a (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)). The court correctly held that the relevant interpretive considerations in this case "clearly demonstrate" that oil was discharged "from" the Macondo Well. *Ibid.* As the court explained in both its original and supplemental opinions, that conclusion follows from "the express terms of the statute." *Id.* at 12a; see *id.* at 15a (explaining that the court "[i]nterpret[ed] the CWA according to its plain terms").[12]

BP is therefore wrong in asserting (Pet. 26-27) that the decision below "stands in stark contrast" to *United States* v. *Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993), cert. denied, 512 U.S. 1245 (1994). In that case, the Second Circuit applied the

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[12] The rule of lenity is inapplicable for the additional reason that the phrase at issue—vessel or facility "from which oil * * * is discharged," 33 U.S.C. 1321(b)(7)(A)—appears in a provision that has only civil applications. Cf. 33 U.S.C. 1319(c) (providing criminal penalties for violations of other provisions of Section 1321).

rule of lenity to a different CWA provision only after concluding that the statute was "at best ambiguous." *Id.* at 649. BP goes even further afield in suggesting (Pet. 23-26) that the decision below implicates any question about the interaction between the rule of lenity and the "public welfare" doctrine. Cf. *Hanousek* v. *United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from the denial of the petition for a writ of certiorari); *United States* v. *Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), cert. denied, 513 U.S. 1128 (1995). The decision below neither discussed nor relied upon the public-welfare doctrine.

Second, contrary to BP's contention (Pet. 28-32), the court of appeals' statement that the rule of lenity applies only when a statute contains a "grievous ambiguity," Pet. App. 27a (quoting *Barber*, 560 U.S. at 488), does not reflect any confusion or disagreement warranting this Court's intervention. This Court's decisions regularly use the same phrase. See, *e.g.*, *Abramski* v. *United States*, 134 S. Ct. 2259, 2272 n.10 (2014); *Robers* v. *United States*, 134 S. Ct. 1854, 1859 (2014); *United States* v. *Castleman*, 134 S. Ct. 1405, 1416 (2014). And while this Court and the courts of appeals also employ other formulations, those linguistic differences do not reflect any substantive disagreement about the rule's scope. To the contrary, the circuits that BP identifies (Pet. 31) as employing an "undiluted 'strict construction' formulation" of the rule have also used the phrase "grievous ambiguity." See, *e.g.*, *United States* v. *Black*, 773 F.3d 1113, 1117 (10th Cir. 2014); *Donnell* v. *United States*, 765 F.3d 817, 820 (8th Cir. 2014), cert. denied, 135 S. Ct. 1519 (2015); *United States* v. *Brown*, 740 F.3d 145, 151 n.11 (3d Cir. 2014).

c. Anadarko contends that the decision below "create[s] substantial confusion as to whether a single discharge can come from multiple facilities or vessels." Pet. 13; see Pet. 13-19, 22-24. Anadarko urges this Court to grant review and hold that any given discharge of oil can come "from" only one vessel or facility. That question is not presented here.

Consistent with Anadarko's position, the district court held that the oil released into the Gulf was discharged only "from" the Macondo Well, not from the *Deepwater Horizon*. Pet. App. 61a-62a. Anadarko and BP were both held liable based on their status as owners of the well, not based on their relationship to any other "facility" or "vessel." See *id.* at 61a, 63a. In light of Transocean's settlement with the government, the court of appeals had no occasion to decide whether the oil was discharged "from" the *Deepwater Horizon* as well as "from" the well. As Anadarko recognizes (Pet. 13), the court of appeals stated that it "explicitly did not reach" the question whether "only one instrumentality may be held liable for a given discharge." Pet. App. 23a; see *id.* at 21a-22a.

Anadarko maintains (Pet. 13-14 & n.1) that aspects of the court of appeals' opinion reflect an implicit assumption that a particular discharge can come "from" more than one source. But "[t]his Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). Here, the court of appeals' conclusion that oil was discharged "from" the well was both a fully suffi-

cient basis, and the court's only explicit basis, for its affirmance of the district court's liability finding.[13]

d. Petitioners contend that the court of appeals' supplemental opinion conflicted with its original opinion and replaced the "loss of controlled confinement" test with an "absence of controlled confinement" test. Anadarko Pet. 23-24; see BP Pet. 34-35. That characterization is refuted by the court's supplemental opinion, which repeatedly confirmed the court's original holding that "a vessel or facility is a point 'from which oil or a hazardous substance is discharged' if it is a point at which controlled confinement is lost." Pet. App. 27a (citation omitted); see, *e.g.*, *id.* at 15a, 18a, 21a, 25a. The court also explained that the undisputed facts make clear that the Macondo Well was a point at which controlled confinement of oil was lost. Among other things, petitioners conceded that cement was pumped into the well "to prevent hydrocarbons * * * from migrating into the wellbore," that the cement "was critical for maintaining *well control*," and that the blowout began when the cement failed to perform its function. *Id.* at 18a-19a (citations omitted). The failed cement seal was thus a point at which controlled confinement was lost, and that failed seal was "undisputedly" located in the well. *Id.* at 19a.

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[13] Anadarko asserts (Pet. 16-19) that "vessels," "onshore facilities," and "offshore facilities" are defined as mutually exclusive categories. Anadarko infers from that fact that a given discharge can come from only one category. Anadarko's conclusion does not follow from its premise. Section 1321(b)(7)'s use of the word "or" indicates that a discharge from any one of the listed sources gives rise to liability, but it does not exclude the possibility that a particular discharge of oil could come "from" multiple sources.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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